

February 7, 2022

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Petition for Emergency Relief in 3G Sunset, GN Docket No. 21-304

Dear Ms. Dortch:

On February 4, 2022, I spoke with Ethan Lucarelli, Acting Legal Advisor for Wireless and Public Safety to Chairwoman Rosenworcel, with regard to the above captioned proceeding. I urged the Commission to be prepared to issue an Order to prevent the shut down of AT&T's 3G network unless AT&T can demonstrate either: (a) that it has made arrangements with the alarm industry to prevent disruption of critical services identified in the record, such as home medical alert systems, DUI monitoring systems, home confinement alarms, and other systems necessary to protect life and safety; or, (b) AT&T is capable of immediately restoring service in the event of a significant disruption to these systems critical to protecting safety of life and property.

I stressed that the situation here is radically different from the recent situation involving altimeters and deployment of lower C-Band networks. Here, the alarm industry has been delayed by circumstances genuinely beyond their control. Specifically, the pandemic and accompanying chip shortage. While AT&T's argument that the FAA and the aviation industry had two years to prepare for roll out was entirely appropriate in the altimeter context – where the FAA delayed conducting the necessary altimeter survey until the last minute – the alarm industry has been working diligently over the last two years to upgrade their equipment. If chips are unavailable, then chips are unavailable. While AT&T argues that alarm companies could have diverted resources from new subscribers in the early stages of the pandemic, this is an unreasonable argument here. People eager to have new alarms installed in 2020 were not the same people who already have alarms and were unwilling to allow workers into their homes. Nor could the alarm industry reasonably have anticipated the length and severity of the chip shortage.

In any event, as Public Knowledge argued in previous filings, these equity arguments go to the question of who should pay for any additional costs associated with a delay in the 3G shutdown. They do not mitigate the harm that will result based on the evidence in the record. In light of allegations raised by the aviation industry that wireless carriers (and the FCC) do not have the same concern for safety and therefore cannot be trusted in their interference analysis, it would be particularly unfortunate if AT&T's actions disrupted critical life and safety alarm services. Failure of the Commission to act to avert such an outcome (or to move swiftly to restore service in the event of an interruption) would give credence to the critics of the Commission's actions in C-Band, even though the two cases are factually very different.

Commission Authority to Issue Necessary Orders to Preserve Service.

Section 4(i) states: “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”¹ Courts have referred to this as the “necessary and proper clause of the Communications Act,” authorizing the Commission to take whatever action is required to fulfill its responsibilities.² Here, the Commission would be required to issue an “order” prohibiting AT&T from shutting down its 3G systems (or some other disposition the Commission deems necessary to avert the risk of harm to life and property). This would be an order pursuant to the FCC’s authority under Section 201(b), finding it unreasonable for a carrier to shut down its network where it would result in endangering life and property. The Commission may also invoke its authority under Section 214, finding that permitting the shutdown is contrary to the public interest because it will impair service to communities where alarm systems are reliant on AT&T’s network. Additionally, the Commission may invoke its general authority under Section 303(b)³ and its obligation to protect public safety under Section 1.⁴

To be clear, this would not be a license modification pursuant to Section 316, as nothing in the license is modified. Nor is this a rule as defined by 5 U.S.C. § 551(4), and therefore does not require a notice and comment rulemaking pursuant to 5 U.S.C. § 553.⁵ Rather, what the Commission would issue is an order as defined by 5 U.S.C. § 551(6) -- “a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other

¹ 47 U.S.C. § 154(i). It is important to distinguish Section 4(i), which provides the Commission with the basic authority to take what actions are necessary to carry out its statutorily assigned duties, with exercise of “ancillary authority.” While 4(i) is part of the rationale given by the Supreme Court in identifying the FCC’s ancillary authority, *See United States v. Southwestern Cable*, 392 U.S. 157 (1968), it is not limited to exercise of ancillary authority.

² *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (citations omitted).

³ 47 U.S.C. § 303(b).

⁴ 47 U.S.C. § 151. *See Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (identifying public safety as core responsibility of the Commission).

⁵ Even if Section 553 of the APA applied, the Commission has put the Petition for Emergency Relief on public notice, and all interested parties have had more than 30 days to comment. AT&T, the primary party at interest, has filed both an opposition to the Petition and multiple *ex partes*. Furthermore, even assuming Section 553 applies, and even assuming notice was for some reason insufficient, the Commission may find “for good cause” that the public interest requires issuance of the rule without opportunity for notice and comment. 5 U.S.C. § 553(b)(B). Given the risk to safety of life and property supported by the record, good cause surely exists here.

than rule making but including licensing.” An order is a result of an “adjudication,”⁶ and – absent a statutory requirement to the contrary – requires neither hearing nor public notice.⁷

Again, to be specific, the FCC (or the Wireless Bureau pursuant to delegated authority) would issue an Order, *i.e.*, an “injunctive” command prohibiting AT&T from turning off its 3G network (or, alternatively an “affirmative” command to engage in other activity, such as coordinate phase out of its 3G network with the alarm industry as suggested by the AICC⁸), as that term is defined by 5 U.S.C. § 551(6). The FCC is authorized to issue such an Order pursuant to Section 4(i), invoking its authority over a CMRS Title II network under Sections 201(b) and 214(a)-(c), its general authority over wireless services pursuant to Section 303(b), and its responsibility to protect safety of life and property in accordance with Section 151. The exercise of this authority is supported by the evidence in the record, demonstrating that alarm systems critical to safety of life and property are at significant risk of becoming inoperable if AT&T adheres to its current schedule and does not take steps to coordinate with the alarm industry. Such an Order therefore falls well within the scope of the Commission’s authority, and does not violate any provision of the Administrative Procedure Act.

In accordance with Section 1.1206(b) of the Commission’s rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld
Senior Vice President
PUBLIC KNOWLEDGE

cc: Ethan Lucarelli

⁶ 5 U.S.C. § 551(7).

⁷ This should not be confused with a Declaratory Ruling pursuant to Rule 1.2. 47 C.F.R. § 1.2. A declaratory ruling is a specific type of adjudication to “resolve a controversy or remove uncertainty.” 5 U.S.C. § 554(e). As Section 554(e) makes clear, a Declaratory Ruling is simply one species of Order an agency may issue, noting that “with like affect as with other *orders*” an agency may issue a Declaratory Ruling “in its sound discretion.” 5 U.S.C. § 554(e) (emphasis added).

⁸ See Letter of John A. Pendergast, attorney for AICC, to Marlene Dortch, Secretary, FCC, filed in GN Docket No. 21-304 (January 12, 2022).